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No. 77-1190

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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ALL ISLAND DELIVERY SERVICE, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioners challenge the decision of the Interstate Commerce Commission to forbid rate bureaus to file protests against rate tariffs filed by their members. The background of this litigation is described at pages 1-4 of our brief in opposition to No. 77-755, the companion case to this petition.[1]

The Commission entertained arguments from shippers and other persons who contended that, if rate bureaus were allowed to file protests against tariffs of single carriers, the bureaus could practice "intimidation and coercion of smaller or 'innovative' carriers who do not possess

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[1]We are furnishing counsel for petitioners in this case with copies of our response in No. 77-755, and we are furnishing counsel for petitioners in No. 77-755 with copies of this memorandum.

the resources to defend their proposals against the collective weight, funds, and expertise of the bureaus" (Pet. App. 49a). The Commission found no "evidence of any flagrant abuse by rate bureaus in the exercise of [their] right to protest" (*id.* at 50a). But the Commission also concluded that "selective protests can be as effective as mass protests to obstruct competition and choke rate initiatives" (*ibid.*).

Starting with the premise "that antitrust immunity must be strictly and narrowly construed" (Pet. App. 50a) and that "[t]he right of a carrier member of a ratemaking bureau to take independent action at any time in the ratemaking process is absolute" (*ibid.*), the Commission concluded that "it is necessary to limit the bureaus' right to protest in order to foster independent action" (*ibid.*).[2] The Commission explained that individual bureau members could continue to file protests, but that "using the bureaus as a method of policing the independent actions of a few carriers has the practical effect of stifling competition" (*id.* at 51a).

The Commission adhered to its decision after reconsideration (Pet. App. 88a-94a). It stated (*id.* at 90a): "We cannot emphasize too strongly that the right of a carrier member of a ratemaking bureau to take independent action before or after the collective ratemaking process is absolute * * *." "If a practice restricts or tends to restrict the right of carrier independent action, the statute requires that it be prohibited. On this record, we have become convinced that bureau protests are a deterrent to individual member carriers' free and unrestrained right of

[2]62 Stat. 472, 49 U.S.C. 5b(6), provides that the Commission "shall not approve * * * any [rate bureau] agreement * * * unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action * * *."



independent action. * * * We take official notice of the fact that since our prohibition became effective on July 15, 1975, there has been a substantial increase in the publication of independent action proposals and a decrease in the number of protests filed" (*id.* at 91a).

The court of appeals affirmed (Pet. App. 1a-14a). It relied on the Commission's statutory authority to impose on the rate bureaus any conditions the Commission believes to be necessary (*id.* at 7a) and agreed with the Commission's conclusion that the rule is necessary to promote independent action by rate bureau members (*id.* at 8a). The court granted a petition for rehearing but adhered to its earlier decision (*id.* at 15a-16a).[3]

2. Petitioners do not argue that the Commission's decision is arbitrary, capricious, or unsupported by substantial evidence. They argue, instead, that the Commission must allow rate bureaus to protest independent tariffs even if, as the Commission found, such protests will adversely affect the statutory right of independent action. Petitioners rely on both the right of protest specified in Section 216(e) of the Interstate Commerce Act, as added and amended, 49 Stat. 558, 49 U.S.C. 316(e), and the First Amendment.

The rule against protests by rate bureaus does not, however, abrogate the right of protest created by Section

[3]The initial decision had been rendered by a divided court; the majority opinion had been written by Mr. Justice Clark and delivered only after his death. As a technical matter, therefore, the panel initially was unable to render a decision. Judge Hall joined the panel on rehearing and joined Judge Butzner to adopt Mr. Justice Clark's opinion as the opinion of the court. Judge Widener dissented, arguing that any organization, including a rate bureau, has an unqualified statutory right to file a protest against any tariff (Pet. App. 11a-14a, 16a).

216(e). Any carrier may file a protest in its own name.[4] The Commission's rule simply restricts the extent to which carriers may file protests collectively through a particular agent. And the restriction on the right of carriers to act through the rate bureau as an agent is authorized by the Reed-Bulwinkle Act of 1948, 62 Stat. 472, 49 U.S.C. 5b(2), which provides that the Commission may impose on the operation of rate bureaus "such terms and conditions as the Commission may [find] necessary * * *."

The rate bureaus' principal function is to permit carriers to discuss rates. To make that discussion possible, Congress authorized the Commission to give antitrust immunity to the bureaus (49 U.S.C. 5b(9)). But Congress' recognition that collective action, free from antitrust scrutiny, might lead to abuse is reflected in the fact that no rate bureau may have antitrust immunity without the Commission's permission, and on the Commission's terms.

The rule against filing protests is a reasonable one, which serves to confine the bureaus closely to their major purpose (rate deliberations) and gives force to the principle that antitrust immunity should not be extended more broadly than necessary. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217-218. The Commission found that rate bureau protests "obstruct competition and choke rate initiatives" (Pet. App. 50a), and nothing in the statute requires the Commission to

[4]Carriers also may file protests jointly (Pet. App. 92a).



give antitrust immunity to entities that engage in these practices that stifle the independent action that the Act was designed to preserve.[5]

Petitioners' argument based on the First Amendment fares no better. The Commission has not prohibited any carrier from filing a protest; it has simply limited the carriers' choice of agents. None of the cases on which petitioners rely dealt with a limitation of this sort. The Commission has decided only that a rate bureau may not *both* protest independent filings *and* claim antitrust immunity for its collective ratemaking processes.

It is unnecessary to consider whether the First Amendment itself protects a "right to file protests" because, at all events, the First Amendment does not protect a right to have antitrust immunity. Antitrust immunity is a valuable benefit given by the Commission, under the statute, to collective activities of organizations that will advance the national transportation goals. The Commission may properly conclude that an organization desiring to take advantage of that benefit must engage in less than all of the activities that might be among the constitutional rights of persons and organizations in

[5]There is no foundation for petitioners' apparent argument that Section 216(e) gives rate bureaus an "absolute" right to file protests that is outside the scope of the Commission's power to impose conditions under Section 5b(2). Section 216(e) does not refer to rate bureaus at all, and, as the Commission explained (Pet. App. 91a-92a), "[t]he general language of section 216(e) * * * cannot be used to defeat the authority of the Commission to condition its approval or continued approval of carrier ratemaking agreements to achieve the express statutory standards * * * and the prohibition of section [5b(6)]" against bureau interference with independent carrier action.

general.[6] The Commission has concluded that rate bureaus should concentrate on collective discussions of rates, and that carriers desiring to protest independent tariffs should do so themselves or through some other organization. Such a decision is especially appropriate where, as here, the Commission has concluded that rate bureau protests frustrate the right of independent action conferred by Section 5b(6) and thus frustrate one of the statutory goals that Congress sought to achieve by extending antitrust immunity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1. The Court held in *Buckley* that candidates have a right, protected by the First Amendment, to spend as much money as they have available to promote their candidacies. But it also held (424 U.S. at 57 n. 65, 97-104) that Congress could require the candidates to forego the exercise of this right if they chose to accept public financing. Similarly, here, we may assume that organizations have a right to file protests. But the Commission, acting pursuant to statutory authority, may require rate bureaus to forego this right if they choose to accept the benefit of antitrust immunity for their essential ratemaking activities.

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